IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 10TH JANUARY 2007 / 20TH PAUSHA 1928

Ins.APP.No. 35 of 2006()

IC.41/2003 of EMPLOYEES INSURANCE COURT, ALAPPUZHA

APPELLANTS/OPP.PARTIES.

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1. THE REGIONAL DIRECTOR,
   EMPLOYEES STATE INSURANCE CORPORATION,
   SWARAJ ROUND NORTH, THRISSUR.

2. THE RECOVERY OFFICER, ESI CORPORATION,
   REGIONAL OFFICE, THRISSUR.

BY ADV. SMT.T.D.RAJALAKSHMY, SC, ESI CORPN.

RESPONDENTS: APPLICANT.

SANJAY KUMAR AGARWAL, DIRECTOR,
PERIYAR STEEL PVT.LIMITED,
INDUSTRIAL DEVELOPMENT AREA,
ERUMATHALA POST, ALUVA.

BY ADV. SRI.ASOK M.CHERIAN
SRI.SANTHOSH G. PRABHU

THIS INSURANCE APPEAL HAVING BEEN FINALLY HEARD ON 10/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T. SANKARAN, J.

INS. APPEAL NO. 35 OF 2006

Dated this the 10th day of January,2007

JUDGMENT

The respondent herein filed I.C.No.41 of 2003 before the Employees' Insurance Court, Alappuzha under Section 75 of the Employees' State Insurance Act, challenging Exts.P1 and P2 orders issued by the Corporation under Section 85B of the Act. Ext.P1 order was issued by the Corporation demanding damages for the default in payment of contribution for the period from May 1988 to August 2001. Ext.P2 order was issued demanding damages for the omitted contribution amount. In the application filed by the respondent before the Insurance Court, it is stated thus:

> "The applicant is the Director of the Periyar Steel Pvt. Ltd., a small scale steel rolling mill. Though the establishment commenced its production from December 1996, the work was not regular. From June 1997 to March 1998 the establishment remained closed due to power cut. In fact the establishment started its full fledged operation from January 2001 only. Hence the Applicant submitted the registration form of employees only in December 2000. Since the workers were not fully engaged in the establishment till January 2001, the applicant did not collect the

> contributions from the employees and from January 2001 onwards the Appellant is deducting the employees contribution and depositing the contributions to the Corporation along with employer's contribution without any default."

It is also stated that the respondent herein was under the belief that the Corporation has waived damages. The facts leading to such a contention are also stated in the application filed by the respondent herein.

2. No evidence was adduced before the Employees' Insurance Court by any of the parties. The Employees' Insurance Court held that there was no contumacious conduct on the part of the respondent herein. The application filed by the respondent was thus allowed and Exts.P1 and P2 orders imposing damages were set aside. The learned counsel for the appellants submitted that the contentions put forward by the applicant before the Employees' Insurance Court have not been established by any acceptable evidence and, therefore, the Employees' Insurance Court was not justified in waiving the damages. The appellants also submitted that financial difficulty is not a valid

justification for waiver of damages. Learned counsel for the respondent, on the other hand, contended that the Employees' Insurance Court has considered the contentions put forward by the respondent herein and came to the conclusion that there was no contumacious conduct on the part of the respondent/employer. He submitted that there are no grounds to interfere with the well considered judgment passed by the court below.

3. Since the respondent having approached the Employees' Insurance Court challenging Exts.P1 and P2 orders, it is for him to establish the grounds raised in the application. The facts leading to the conclusion as to whether there was contumacious conduct on the part of the employer, shall be proved by the person who sets up the same. Here there is no evidence to indicate as to whether the contentions put forward by the respondent herein are justifiable and whether there was any contumacious conduct or willful default on his part. The learned counsel for the respondent relied on the decision in **M/s.Prestolite of India Ltd.**

v. **The Regional Director and another** (AIR 1994 SC 521) wherein it is held thus:

> "Even if the Regulations have prescribed general guidelines and the upper limits at which the imposition of damages can be made, it cannot be contended that in no case, the mitigating circumstances can be taken into consideration by the adjudicating authority in finally deciding the matter and it is bound to act mechanically in applying the upper most limit of the table."

The learned counsel also relied on the decisions in **Regional Director, E.S.I.Corporation** v. **Sakthi Tiles** (1988(2) KLT 280); **E.S.I.Corporation** v. **Meecos Ltd.** (1980 KLT 179); **E.S.I.Corporation** v. **Hindustan Tile Works** (1999(2) KLT 851) and **E.S.I. Corporation** v. **Naduvattam G.M.V.S.Sangham Ltd.** (2000 (2) KLT 254) and contended that unlike interest, penalty is not payable in all cases where there is default. He submits that when there is no contumacious conduct or deliberate or willful default in payment of the contribution and if there are circumstances which would indicate that a penalty should not be imposed, it cannot be said that the Employees' Insurance Court has no jurisdiction to waive the penalty. It is also pointed out that it is

not only the financial stringency that is pointed out by the respondent herein, but there are other circumstances warranting an inference that the respondent herein was not guilty of any contumacious conduct.

4. Apart from producing some documents, no evidence was adduced by the respondent herein before the Employees' Insurance Court. All the facts and circumstances were not made available before the Employees Insurance Court to arrive at a proper finding as to whether the respondent herein is entitled to waiver of penalty. The finding that there was no contumacious conduct on the part of the respondent herein is based on no evidence. Therefore, I am of the view that the judgment passed by the court below is liable to be set aside and the matter is liable to be remanded for fresh disposal.

In the result, the Insurance Appeal is allowed, the judgment passed by the court below is set aside and

the matter is remanded for fresh consideration. Both parties shall have reasonable opportunity to adduce evidence and to produce documents. The Employees' Insurance Court shall consider all the facts and circumstances of the case and dispose of the matter in accordance with law.

(K.T.SANKARAN)
Judge

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